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Supreme Court, U.S.
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No. 95-181

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNION UNDERWEAR COMPANY, INC.,
d/b/a FRUIT OF THE LOOM - - - - Petitioner

versus

MARY KAY SCEARCE;
THOMAS A. DOCKTER, Administrative
Law Judge; and
WORKERS' COMPENSATION BOARD - Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT WORKERS' COMPENSATION BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VALERIE L. SALVEN
Counsel of Record
Department of Workers' Claims
1270 Louisville Road
Frankfort, KY 40601
Phone: (502) 564-5550
Fax: (502) 564-5934
Attorney for Respondent,
Workers' Compensation Board

August 30, 1995

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

15 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Is it a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for a party in a state workers' compensation administrative proceeding to be required to schedule a deposition at the party's own expense in order to cross examine a physician about the contents of written medical report?

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CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is correctly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

In addition to Ky. Rev. Stat. (KRS) Ann. § 342.033 (Michie/Bobbs-Merrill, 1992), Respondent/Board wishes to

add reference to Ky. Rev. Stat. (KRS) Ann. § 342.310 (Michie/Bobbs-Merrill, 1992).

COUNTERSTATEMENT OF THE CASE

For over twenty years, Mary Kay Scearce worked for Petitioner, Union Underwear Company, Inc. d/b/a Fruit of the Loom, as a sewing machine operator binding legs on briefs. TR 369. Ms. Scearce stopped working on February 26, 1988, as a result of sharp pain which ran up her right arm into her shoulder and neck. She also developed pain in her left wrist. *Id.*

On or about July 30, 1990, Ms. Scearce filed a formal claim for Kentucky workers' compensation benefits. She alleged the development of carpal tunnel to her left and right wrists — and a pinched nerve in her right arm, shoulder and neck — as a result of the repetitive motion involved in operating her sewing machine. TR 5-11. Pursuant to Ky. Rev. Stat. (KRS) Ann. § 342.033 (Michie/Bobbs-Merrill, 1992), Ms. Scearce introduced direct testimony from three physicians through written medical reports.

The version of KRS 342.033 in effect in 1990 provided that reports from as many as three physicians were to be made part of the evidentiary record on behalf of a party in a workers' compensation proceeding, "subject to the right of an adverse party to object to the admissibility of such report and to cross-examine the reporting physician." Petitioner Fruit of the Loom had a corresponding right under KRS 342.033 to introduce direct testimony from as many as three physicians through written medical reports "subject to the right of an adverse party to object to the admissibility of such report and to cross-examine the reporting physician."

Fruit of the Loom introduced depositions from three physicians, including Dr. Morton Kasdan, a hand surgery specialist, and a written report from a fourth physician. Dr. Kasdan testified that all of the tests he performed

upon Ms. Scearce were negative or normal except for the "Phalen's test", which indicated numbness and tingling and possible nerve compression at plaintiff's wrist. TR 225. Dr. Kasdan concluded that Ms. Scearce probably suffered from "cumulative fatigue disorder," (TR 227) which is also known as repetitive stain disorder and/or overuse syndrome. TR 231. He found no impairment under American Medical Association Guidelines, however. TR 227.

On November 1, 1990, counsel for Mary Kay Scearce filed a Motion to File the Medical Report of Dr. Oris Aaron. TR 65. Counsel for Fruit of the Loom responded promptly with a "Defendant's Demand of Right of Cross-examination and Motion to Produce Physician, and Objection to Admissibility of Medical Report." TR 83. The administrative law judge sustained Ms. Scearce's "Motion to File the Written Report of Dr. Oris Aaron;" recognized and granted Fruit of the Loom's constitutional right to cross-examine Dr. Aaron; and denied Fruit of the Loom's motion to have Ms. Scearce produce Dr. Aaron for deposition and to pay the costs of the deposition. TR 109. This same scenario followed with respect to motions by Mary Kay Scearce to file two additional medical reports from two additional physicians. TR 111; TR 121. Counsel for Fruit of the Loom filed a notice to the Kentucky Attorney General of questions concerning the constitutionality of KRS 342.033 and related regulations, pursuant to KRS 418.075 and Kentucky Civil Rule Of Procedure 24.03. TR 126.

Following a formal hearing before Administrative Law Judge Thomas A. Dockter on February 7, 1991, which included testimony from claimant Mary Kay Scearce with direct and cross-examination by the parties, the administrative law judge determined that Mary Kay Scearce had suffered an occupational disability of 50% resulting from the physical requirements of her sewing machine operator job at the Fruit of the Loom plant. Ms. Scearce was

awarded benefits of $123.95 per week for 425 weeks. Opinion, Award and Order of February 7, 1992; TR 326-334, Petitioner's Appendix 173a-179a.

An administrative appeal was taken by Fruit of the Loom to the Kentucky Workers' Compensation Board. By opinion rendered on October 2, 1992, the Board reversed the decision of the administrative law judge, concluding that Mary Kay Scearce had failed to provide a "reasoned medical opinion establishing a causal nexus between the work and the impaired condition" so that there was a lack of substantial evidence to support a finding of work- relatedness. TR 484-492; Petitioner's Appendix 180a-186a.

Mary Kay Scearce appealed to the Kentucky Court of Appeals. By opinion rendered September 24, 1993, the Kentucky Court of Appeals reversed the order of the Kentucky Workers' Compensation Board relating to Mary Kay Scearce's claim for benefits, and affirmed the order of the Board in all other respects including its acceptance of the written medical reports filed with the administrative law judge. The Kentucky Court of Appeals noted that Fruit of the Loom could have deposed any or all of the treating physicians, but chose not to do so. Kentucky Court of Appeals Opinion of September 24, 1993; Petitioner's Appendix 187a-192a.

Fruit of the Loom appealed the matter to the Supreme Court of Kentucky, which rendered its opinion on February 16, 1995, in the case of *Union Underwear Co., Inc.* v. *Scearce*, 896 S.W.2d 7 (Ky., 1995). The Supreme Court of Kentucky affirmed the opinion of the Kentucky Court of Appeals, noting that Fruit of the Loom was not denied the opportunity to cross-examine Ms. Scearce's physicians simply because it chose not to incur the cost of cross-examination of them. *Scearce, Id.*, S.W.2d 896 at 9.

REASONS FOR DENYING REVIEW

It Is Not a Violation of Due Process for Parties in a State Workers' Compensation Administrative Proceeding to be Required to Schedule Depositions, at Their Own Expense, in Order to Cross-Examine Physicians About the Contents of Medical Reports Introduced by Other Parties.

Fruit of the Loom's citation of one federal circuit court of appeal case concerning the surprise introduction of an affidavit from a "fact" or occurrence witness, and its citation of cases from other states indicating that some other states assign the costs of depositions and cross-examinations in ongoing administrative proceedings differently than does Kentucky in workers' compensation cases, does not address the issue of the constitutionality of the procedure used in this case.

Fruit of the Loom fails to cite a case decided by *this* Court in 1971 concerning a similar question arising out of a federal social security claim proceeding, *Richardson* v. *Perales*, 402 U.S. 389 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). In *Perales*, this Court examined the question of "what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing." 402 U.S. at 402. This Court concluded that a written report by a licensed physician may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, may constitute substantial evidence supportive of a finding by the hearing examiner "adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." *Id.*

Fruit of the Loom relies upon the case of *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) as support for its argument that the proponent of a medical report introduced in an administrative proceeding for

workers' compensation benefits is obligated to pay the costs of a deposition and cross-examination by another party. This Court discussed the *Goldberg* v. *Kelly* case in *Perales, supra*, and noted that *Kelly* "had to do with the termination of AFDC benefits without prior notice." 402 U.S. at 407. The *Perales* proceeding was different, however, because "we are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice." *Id.*

In the case *sub judice* as in *Perales*, notice was given to the opposing party of the intent to rely upon specified medical reports. The reports were made available for inspection by the opposing party, and the authors of those reports were known and were subject to subpoena and the very cross-examination that Fruit of the Loom asserts it has not enjoyed. Furthermore:

> The specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctor's credibility or veracity. *Kelly* affords little comfort to the [Petitioner]. 402 U.S. at 407.

It would seem that little is accomplished by Fruit of the Loom's reference to cases, including one from Kentucky, that discuss the Sixth Amendment to the United States Constitution and the right of an accused in criminal prosecutions to be confronted with the witnesses against him. This case is concerned with due process in an *administrative* proceeding, not with the right of an accused to confront witnesses in a *criminal* trial. There is simply no constitutional basis for Fruit of the Loom's assertion that "the litigants in a Kentucky workers' compensation case are entitled to the same constitutional due process as the criminal defendant . . ." Petition, page 33.

It has not been suggested that Fruit of the Loom was unable to afford the cost of deposing Ms. Scearce's examin-

ing physicians, and KRS 342.310 provides that if workers' compensation proceedings have been brought without reasonable ground, the whole cost of the proceedings may be assessed against the claimant including "deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other-of-pocket expenses."

Footnote No. 31 of the Petition suggests that the Supreme Court of Kentucky has decided a federal question in a way that conflicts with the decisions of other state courts. What the Supreme Court of Kentucky actually decided in this case is that there is no case law or statutory law in *Kentucky* which requires the cost of cross-examination in a workers' compensation case to be borne by the party introducing a medical report. 896 S.W.2d at 9.

The fact that cases from other states that have different statutory requirements support those differing statutory requirements does not mean that there is a conflict between Kentucky and another state on a question of federal constitutional law. Instead, it means that workers' compensation programs differ from state to state, as they may. Workers' compensation is a traditional area of state rather than federal authority. Furthermore, there is no conflict with the case of *Cuellar* v. *Texas Employment Commission*, 825 F.2d 930 (5th Cir. 1987) since, as Fruit of the Loom notes at page 25 of the Petition, "Cuellar requested and was denied the right to subpoena and cross-examine the witness against him."

In *this* case, Fruit of the Loom had both the right and the opportunity to subpoena and cross-examine the authors of the medical reports introduced by Ms. Scearce. It declined to do so.

In general civil litigation, deposition and witness costs are routinely shifted to the losing party after judgment. Fed. Rule of Civil Procedure 76. In Kentucky, the costs may be shifted in some Workers' Compensation cases pur-

suant to KRS 342.310. Requiring all claimants in state workers' compensation cases to pay for the cross-examination of medical reports from expert witnesses would be an invitation for procedural maneuvering and trial strategy by which the injured workers would suffer the consequences of the resulting confusion and/or delay. See *Frazier* v. *H. C. Price-Ciri Const. JV,* 794 P.2d 103 (Alaska, 1990) at 108.

CONCLUSION

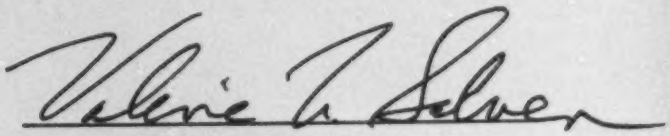
For all the foregoing reasons, Fruit of the Loom's Petition for Writ of certiori should be denied.

Respectfully submitted,

VALERIE L. SALVEN
General Counsel
Department of Workers' Claims
1270 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-5550
Counsel for Respondent/
Workers' Compensation Board

CERTIFICATE OF SERVICE

I, Valerie L. Salven, counsel for respondent, Workers' Compensation Board, herein and a member of the Bar of this Court, hereby certify that on this 30th day of August, 1995, three (3) copies of the Brief for Respondent, Workers' Compensation Board, in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Hon. David W. Anderson, Harned, Anderson & Bachert, 324 East Tenth Avenue, P.O. Box 1270, Bowling Green, Kentucky 42102-1270, Telephone (502) 782-3938, Counsel for Petitioner herein, Union Underwear Company, Inc. d/b/a Fruit of the Loom; Hon. Thomas A. Dockter, Administrative Law Judge, Department of Workers' Claims, 410 W. Chestnut Street, Suite 700, Louisville, Kentucky 40202, Telephone (502) 595-4666; Hon. William A. Miller, Sr., 17th Floor Kentucky Home Life Building, 239 S. 5th Street, Louisville, Kentucky 40202-3269, Telephone (502) 587-0541, Counsel for Respondent Mary Kay Scearce; and Hon. Chris Gorman, Attorney General of the Commonwealth of Kentucky, P.O. Box 2000, Frankfort, Kentucky 40602-2000, Telephone (502) 564-7600. I further certify that all parties required to be served have been served.



VALERIE L. SALVEN
General Counsel
Department of Workers' Claims
1270 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-5550
Counsel for Respondent/
Workers' Compensation Board

APPENDIX

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Ky. Rev. Stat. Ann. § 342.310 (Michie/Bobbs-Merrill, 1992).

Administrative law judge, board or court may assess cost of unreasonable proceedings

If any administrative law judge, the board or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted or defended them.